UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHRISTOPHER HUDSON, in his individual capacity on behalf of himself and others similarly situated, Plaintiff, -against- NATIONAL FOOTBALL LEAGUE MANAGEMENT COUNSEL, NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION, RETIREMENT BOARD OF THE BERT BELL/PETE ROZELLE NFL PLAYER RETIREMENT PLAN, KATHERINE "KATIE" BLACKBURN, RICHARD "DICK" CASS, TED PHILLIPS, SAMUEL MCCULLUM, ROBERT SMITH, AND JEFFREY VAN NOTE, Defendants.	No. 1:18-cv-4483 (RWS)

DEFENDANT NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION'S
REPLY MEMORANDUM IN FURTHER SUPPORT OF ITS MOTION TO DISMISS

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PRELIMINARY STATEMENT

Hudson ignores multiemployer plans' distinct design. Unlike most benefit plans, which are overseen by a single employer, here the Plan is a jointly administered, Taft-Hartley multiemployer plan created through collective bargaining. Multiemployer plans like the Plan are unique in that federal labor law "requires an equal balance between trustees appointed by the union and those appointed by the employer[s]" and does not empower a party to "direct or supervise the decisions of a trustee he has appointed." *N.L.R.B. v. Amax Coal Co., a Div. of Amax*, 453 U.S. 322, 330 (1981). Because the Players Association does not appoint a majority of the Retirement Board or control the decisions of its appointees, the Players Association cannot have a duty to monitor because it does not have "'discretionary authority'" over the administration or management of the Plan. *In re Citigroup ERISA Litig.*, 662 F.3d 128, 135 (2d Cir. 2011) (quoting 29 U.S.C. § 1002(21)(A)).

Even if the Players Association had a duty to monitor, Hudson fails to allege any facts constituting the Players Association's shortcomings in the monitoring process. Hudson contends that requiring facts is "premature" and that his "allegations [against] the appointee fiduciaries" suffice. Mem. in Opp. (Dkt. 72) 38. But Rule 8 requires Hudson to plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Hudson's allegations against the Players Association are pure conclusions, which the Court need not credit. And Hudson's allegations against the Retirement Board—which are, at most, "circumstantial factual allegations"—do not raise a "*reasonable* inference" of a failure to monitor that would cause "the court to infer more than the *mere possibility* of misconduct." *Pension Ben. Guar. Corp. ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 727 (2d Cir. 2013) (emphasis in original).

As for Counts IV and V, Hudson does not dispute that these claims fail if the duty-to-

monitor claim is dismissed. Regardless, both counts against the Players Association must be dismissed because Hudson has not alleged an injury or shown that the Players Association is a proper defendant for these claims.

ARGUMENT

I. Hudson ignores the unique legal structure of jointly administered, collectively bargained multiemployer plans, which precludes recognition of a duty to monitor.

ERISA does not impose on unions a duty to monitor the boards of multiemployer benefit plans. Both the Players Association and the Management Council explained the unique structure of multiemployer plans prescribed by the Labor Management Relations Act (*see* Dkt. 62 at 3–4, 9–12; Dkt. 53 at 9), yet Hudson ignores this authority and its implications for a duty to monitor. Indeed, Hudson concedes the Second Circuit has never recognized a duty to monitor in any context. Mem. in Opp. 34–35 ("[T]he Second Circuit has not directly addressed this issue."). And this Court has recognized that the mere "right to appoint and remove fiduciaries is insufficient to constitute fiduciary status." *In re Morgan Stanley ERISA Litig.*, 696 F. Supp. 2d 345, 356 (S.D.N.Y. 2009) (Sweet, J.).

Unions do not have a duty to monitor multiemployer boards because they do not and cannot control those boards. A person has a fiduciary duty only "'to the extent' that the person" exercises or has "'discretionary authority'" over the "management" or "administration" of the plan. *In re Citigroup ERISA Litig.*, 662 F.3d at 135 (quoting 29 U.S.C. § 1002(21)(A)). Hudson's allegations concern the "Retirement Board as an entity" (Compl. ¶ 12), but the Players Association has no discretionary authority over the Retirement Board as an entity (*see* Dkt. 62 at 9–12). These points are undisputed and defeat Hudson's claim as a matter of law.

Hudson's only response is to suggest that because the Players Association "had the power to appoint [or remove] three of the six members of the Board," it had discretionary authority over

the Plan.[1] Mem. in Opp. 36 n.19. That is "not enough." *Breaux v. Pipefitters Local Union 195*, 807 F. Supp. 42, 45 (E.D. Tex. 1992) ("It is not enough to argue … that the union is a fiduciary … because it elected three of its members to the six-member [Board]."). Three members do not form "a majority," and "[t]he trust agreements … reserve discretionary power … to a majority of the trustees." *Alfarone v. Bernie Wolff Const. Corp.*, 788 F.2d 76, 79 n.1 (2d Cir. 1986); *cf. Sciss v. Metal Polishers Union Local 8A*, 562 F. Supp. 293, 294–95 (S.D.N.Y. 1983) (multiemployer "funds are [not] agents of … unions and [are not] controlled by … unions" (citing *Amax Coal Co.*, 453 U.S. at 331–32)). In the only union-specific case Hudson cites, the court found the union to be a fiduciary because it appointed "the union trustees and … effectively controll[ed] the selection of employer trustees." *Whitfield v. Tomasso*, 682 F. Supp. 1287, 1305 (E.D.N.Y. 1988); *see* Mem. in Opp. 41 (citing *Whitfield*). Hudson has not alleged such unusual facts here. Because the Players Association has no duty to monitor, Hudson's claims must be dismissed.

II. Hudson's allegations lack plausibility because he still has not identified any specific shortcomings in the Players Association's actual monitoring process.

Even assuming the Players Association had a duty to monitor, Hudson has not stated a plausible claim. Hudson presumes that the duty to monitor gives rise to strict liability against unions. It does not. Citing Department of Labor regulations, Hudson suggests that the Players Association has a duty "*to ensure that [its appointees'] performance has been in compliance with the terms of the plan and statutory standards.*" Mem. in Opp. 36 (quoting 29 C.F.R. § 2509.75-8 at FR-17) (emphasis in original). Yet there is no "duty to ensure"—what that regulation actually describes is a "duty to monitor," i.e., to "review[]" "[a]t reasonable intervals the performance of trustees." *Id.*

[1] To the extent the Players Association had a fiduciary duty to appoint qualified people to the Retirement Board, Hudson concedes that he is not alleging that "the persons appointed to the Retirement Board were unqualified when appointed." Mem. in Opp. 37 n.20.

Hudson "does not allege facts about [the Players Association's] actual monitoring process and its specific shortcomings." *Nicolas v. Trustees of Princeton Univ.*, 2017 WL 4455897, at *5 (D.N.J. Sept. 25, 2017) (dismissing a duty-to-monitor claim). Without facts "showing how the monitoring process was deficient," Hudson cannot "state a plausible claim." *White v. Chevron Corp.*, 2016 WL 4502808, at *19 (N.D. Cal. Aug. 29, 2016) (dismissing a duty-to-monitor claim). Hudson suggests it is "premature" to "analy[ze] … the precise contours of the defendants' duty to monitor," but there are no "contours" to "analy[ze]" (Mem. in Opp. 38)—Hudson has not alleged any facts at all. Rule 8 requires facts and there is no special ERISA pleading rule. *See Pension Ben. Guar. Corp.*, 712 F.3d at 719 (noting that "discovery in a suit claiming breach of fiduciary duty" is "probing and costly" and "pleading requirements [are] consistent with the basic purposes of both ERISA and Rules 8 and 12(b)(6)"). Because Hudson has not alleged anything about the Players Association's "monitoring process," his claim must be dismissed. *Id.*

Hudson asserts *Nicolas* and *White* are "distinguishable" (Mem. in Opp. 37), but he never points to any allegations in his complaint about the Players Association's "actual monitoring process and its specific shortcomings" that would distinguish those cases. *Nicolas*, 2017 WL 4455897, at *5. Instead, Hudson just asserts that while the allegations in *Nicolas* and *White* were inadequate, his are "simply not." Mem. in Opp. 38. Yet Hudson's allegations are even more conclusory and implausible than the allegations *Nicolas* and *White* dismissed.[2]

[2] *Compare* Compl. ¶¶ 93–94 *with White*, 2016 WL 4502808, at *19 ("In addition, plaintiffs allege no facts showing how the monitoring process was deficient. They assert that Chevron Corporation breached its duty to monitor (a) by 'failing to monitor its appointees, to evaluate their performance, or to have a system in place for doing so,' and by 'standing idly by as the Plan suffered enormous losses' as a result of the imprudent actions and omissions of the appointees; (b) by 'failing to monitor its appointees' fiduciary process'[;] (c) by failing to ensure that the monitored fiduciaries had a prudent process in place for evaluating the Plan's administrative fees and ensuring that the fees were competitive'[;] (d) by 'failing to ensure that the monitored fiduciaries considered the ready availability of comparable investment options to such a jumbo plan,' including lower-cost options; and (e) by 'failing to remove appointees whose performance was inadequate in that they continued to maintain imprudent, excessive-cost investments, and

In *Nicolas*, the plaintiff alleged, among other things, that the defendant "[f]ailed to monitor its appointees' fiduciary process, which would have alerted any prudent fiduciary to the potential breach because of the excessive administrative and investment management fees and consistent underperformance of Plan investments in violation of ERISA." *Nicolas v. Trustees of Princeton Univ.*, No. CV 17-3695, Dkt. 1, Compl. ¶ 110 (D.N.J. May 23, 2017). The court in *Nicolas* deemed this allegation and the plaintiff's other allegations "legal conclusions as opposed to factual allegations" and dismissed the complaint. 2017 WL 4455897, at *5. Hudson's allegations are just as conclusory. *See, e.g.*, Compl. ¶ 93 (alleging that the "Players Association knew or in the exercise of reasonable diligence, should have known that the … SPDs did not set forth an explanation of what constituted 'clear and convincing evidence'").

In *White*, the plaintiff alleged, among other things, that the defendant "'st[ood] idly by as the Plan suffered enormous losses' as a result of the imprudent actions and omissions of the appointees." 2016 WL 4502808, at *19 (quoting plaintiff's complaint). Hudson alleges nothing so stark as "standing idly by" in the face of "enormous losses." *Id.* Instead, Hudson alleges merely

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an option that did not even keep up with inflation[.]' See Cplt ¶ 133.") *and Nicolas v. Trustees of Princeton Univ.*, No. CV 17-3695, Dkt. 1, Compl. ¶ 110 (D.N.J. May 23, 2017) (alleging that defendant "breached its fiduciary monitoring duties by" "[f]ailing to monitor its appointees, to evaluate their performance, or to have a system in place for doing so, and standing idly by as the Plans suffered losses as a result of its appointees' imprudent actions and omissions with respect to the Plans;" "[f]ailing to monitor its appointees' fiduciary process, which would have alerted any prudent fiduciary to the potential breach because of the excessive administrative and investment management fees and consistent underperformance of Plan investments in violation of ERISA;" "[f]ailing to ensure that the monitored fiduciaries and service providers had a prudent process in place for evaluating the Plans' administrative fees and ensuring that the fees were competitive, including a process to identify and determine the amount of all sources of compensation to the Plans' recordkeepers and the amount of any revenue sharing payments; a process to prevent the recordkeepers from receiving revenue sharing that would increase the recordkeepers' compensation to unreasonable levels even though the services provided remained the same; and a process to periodically obtain competitive bids to determine the market rate for the services provided to the Plans;" "[f]ailing to ensure that the monitored fiduciaries and service providers considered the ready availability of comparable and better performing investment options that charged significantly lower fees and expenses than the Plans' mutual fund and insurance company variable annuity options; and [f]ailing to remove appointees whose performance was inadequate in that they continued to maintain imprudent, excessive cost, and poorly performing investments, all to the detriment of Plan participants' retirement savings.").

that the Players Association "knew or … should have known" (Compl. ¶ 93) that the Retirement Board had "an undisclosed interpretation" of certain terms in the summary plan description. *See* Mem. in Opp. 7 (arguing that the Retirement Board "failed to define or explain terms [and] used legal jargon [in the summary plan description] and then adopted an undisclosed interpretation of these terms that was contrary to the plain and ordinary definitions as understood by the average participant in this Plan" (citing Compl. ¶¶ 70–77)).

Realizing that he has not pled any facts about the Players Association's alleged failure to monitor, Hudson contends that "allegations of inadequate performance by appointee fiduciaries" suffice to state a claim for breach of the duty to monitor. Mem. in Opp. 38 (quoting *In re Fannie Mae 2008 ERISA Litig.*, 2012 WL 5198463, at *7 (S.D.N.Y. Oct. 22, 2012)). When "the complaint relies on circumstantial factual allegations to show a breach of fiduciary duties under ERISA, those allegations must give rise to a '*reasonable* inference' that the defendant committed the alleged misconduct, thus 'permit[ting] the court to infer more than the *mere possibility* of misconduct.'" *Pension Ben. Guar. Corp.*, 712 F.3d at 718–19 (quoting *Iqbal*, 556 U.S. at 678, 679). The circumstantial allegations must be "'suggestive of, rather than merely consistent with, a finding of misconduct.'" *Id.* at 719 (quoting *N.J. Carpenters Health Fund v. Royal Bank of Scot. Grp., PLC*, 709 F.3d 109, 121 (2d Cir. 2013)).

Every case Hudson cites in support of this contention involved a precipitous decline in a company's stock value.[3] These cases stand for the unremarkable point that "inadequate

[3] *In re Fannie Mae 2008 ERISA Litig.*, 2012 WL 5198463, at *7 ("Assuming that the pre-conservatorship Director Defendants and FNMA were monitoring the BPC Defendants at all, they observed the Plan lose 98% of its value, without intervening or replacing any BPC Defendant."); *In re Am. Int'l Grp., Inc. ERISA Litig. II*, 2011 WL 1226459, at *9 (S.D.N.Y. Mar. 31, 2011) (allegations concerned "maintaining AIG stock as an investment option, and the maintenance of that option through the collapse of the company"); *Veera v. Ambac Plan Admin. Comm.*, 769 F. Supp. 2d 223, 231 (S.D.N.Y. 2011) ("Here, as in *Morgan Stanley*, the Monitoring Defendants are alleged to have simply stood by and watched the value of Ambac stock decline precipitously. Based on such statements this Court cannot help but conclude that monitoring

performance by appointee fiduciaries" can sometimes be so flagrant and so publically obvious as to raise a plausible inference of a failure to monitor. *Id.* Indeed, in the lead case Hudson cites, the court found the allegations sufficient because "[a]ssuming that the [defendants] were monitoring [their appointees] at all, they observed the Plan lose 98% of its value, without intervening or replacing any [appointee]." *In re Fannie Mae 2008 ERISA Litig.*, 2012 WL 5198463, at *7. The inadequate performance Hudson complains of—that the Retirement Board failed to "make sufficient disclosures" and failed to write a summary plan description that "reasonably apprise[d] the participants of their rights" (Mem. in Opp. 1)—does not even remotely compare to circumstances as flagrant and obvious as a 98% investment loss. Hudson cites no duty-to-monitor case premised on an alleged failure to properly define terms in the summary plan description.

Finally, Hudson contends that he has pled a plausible claim because his Complaint contains "six specific items of information" that the Players Association "knew or … should have known" and "five specific actions" that it "could have and should have taken." Mem. in Opp. 39. These are "legal conclusion[s] couched as … factual allegation[s]," and Rule 8's pleading standard "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009). Hudson insists these allegations are "specific," but that does not make them "factual." Mem. in Opp. 39. And their "specific[ity]" simply shows that Hudson's conception of the duty to monitor is implausibly granular. *Id.* ERISA does not require employers or unions—by virtue of their power to appoint trustees—to monitor so many

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fiduciaries failed to provide sufficient attention, if any, to the risks of the continued purchase and retention of Ambac stock."); *In re Morgan Stanley ERISA Litig.*, 696 F. Supp. 2d 345, 366 (S.D.N.Y. 2009) ("The Complaint alleges that, as Company Stock in the Plans declined in value by nearly $3 billion dollars, the Monitoring Defendants did nothing, suggesting that no system was in place to review and evaluate the performance of their appointees or that potential breaches were otherwise going unaddressed."); *Perez v. WPN Corp.*, 2017 WL 2461452, at *3 (W.D. Pa. June 7, 2017) (finding that plaintiff had stated a claim that committee members—not the plan sponsor—had "fail[ed] to monitor Labow and WPN from December 5, 2008 through May 19, 2009, while they acted as investment manager for the Plans").

"specific items" or to direct so many "specific acts." *Id.*; *cf. In re Bear Stearns*, 763 F. Supp. 2d 423, 569 (S.D.N.Y. 2011) ("In this Circuit, an employer cannot be a de facto plan administrator where it has named an administrator."); *Johnson v. Evangelical Lutheran Church in Am.*, 2011 WL 2970962, at *5 (D. Minn. July 22, 2011) ("The duty to monitor is limited and does not include a duty to review all business decisions of Plan administrators because that standard would defeat the purpose of having trustees appointed to run a benefits plan in the first place." (citation omitted)); *Lingis v. Motorola, Inc.*, 649 F. Supp. 2d 861, 881-82 (N.D. Ill. 2009) (finding that the duty to monitor has "clear limits" and that a broad duty to monitor would undermine the rationale of delegating authority to a committee).

III. Hudson has not established that he has standing to assert Counts IV and V or that the Players Association is a proper defendant for those counts.

Hudson does not dispute that Counts IV and V fail if the duty-to-monitor claim is dismissed. Additionally, these counts should be dismissed because Hudson has not alleged an injury-in-fact or shown that the Players Association is a proper defendant for obtaining "appropriate equitable relief." *Harris Tr. & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 246 (2000).

Count IV. Through Count IV Hudson seeks "to ensure that his rights and benefits are and will be determined under the Plan in effect when [he] became eligible for benefits." Mem. in Opp. 43. Because Hudson has not alleged that he has been deprived of vested benefits, he lacks standing to bring this claim. *See* Dkt. 62 at 17–18. Hudson does not dispute that he has not "show[n] actual harm" (Mem. in Opp. 45), which "Article III … requires … even in the context of a statutory violation" (*Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016)). Relying on pre-*Spokeo* decisions, Hudson instead asserts that he "does not need to show" actual harm because "a participant does not need to show *individual harm* to 'have Article III standing.'" Mem. in Opp.

45–46 (quoting *Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 433 F.3d 181, 199 (2d Cir. 2005)) (emphasis added). Hudson misses the mark. "Even in cases where plaintiffs need not show an individualized harm, they must still allege some injury in the form of a deprivation of a right as a result of a breach of fiduciary duty conferred by ERISA." *Kendall v. Emps. Ret. Plan of Avon Prod.*, 561 F.3d 112, 120 (2d Cir. 2009). Because Hudson has not "allege[d] some injury," his claim must be dismissed. *Id.*

Recognizing his failure to allege an injury-in-fact, Hudson seeks to recast Count IV as a violation of "ERISA's disclosure requirements" and implies he was injured by "the Board Defendants[']' failure to properly respond to" one of his inquiries. Mem. in Opp. 45–46. But that is not what Count IV alleges. *See* Compl. ¶¶ 96–101. As Hudson admits elsewhere in his brief, Count IV does not concern disclosure; "Count IV seeks a determination that Defendants may not retroactively amend the terms of the Plan or enforce a post hoc amendment." Mem. in Opp. 47 n.32. Hudson has not "assert[ed] a constitutionally sufficient injury arising from th[at] [alleged] breach." *Am. Psychiatric Ass'n v. Anthem Health Plans, Inc.*, 821 F.3d 352, 359 (2d Cir. 2016).

In any event, the Players Association is not an appropriate defendant. Hudson claims that "ERISA § 502(a)(3) has 'no limit … on the universe of possible defendants.'" Mem. in Opp. 47 (quoting *Harris Tr.*, 530 U.S. at 246). Not so. Hudson quotes *Harris Trust*, but omits the "limit" identified by the Supreme Court: "the 'appropriate equitable relief' caveat." 530 U.S. at 246 (quoting 29 U.S.C. § 1132(a)(3)). Because the relief Hudson seeks concerns the "administration of the Plan" and the determination of "rights and benefits" (Compl. ¶ 101)—tasks the Players Association does not perform—the Players Association is not an appropriate defendant.

Count V. For similar reasons, Hudson's claim regarding the Plan's allegedly non-ERISA-compliant limitations provision must be dismissed. Hudson lacks Article III standing because he

has not alleged an injury-in-fact stemming from the limitations provision. *See* Dkt. 62 at 18–19. Hudson's only response is that "so long as the [limitations] provision remains in the Plan documents, he is continually harmed" (Mem. in Opp. 52), but the mere presence of a provision in the Plan documents is not a "concrete injury" (*Spokeo*, 136 S. Ct. at 1459). Indeed, "a breach of fiduciary duty under ERISA in and of itself does not 'constitute an injury-in-fact sufficient for constitutional standing.'" *Trustees of Upstate N.Y. Eng'rs Pension Fund v. Ivy Asset Mgmt.*, 843 F.3d 561, 569 (2d Cir. 2016) (quoting *Kendall*, 561 F.3d at 121)). Because Hudson has not alleged any "concrete injury" for Count V of his Complaint, it must be dismissed, too. *Spokeo*, 136 S. Ct. at 1459.

Regardless, the Players Association is not the correct defendant from which Hudson may obtain "appropriate equitable relief." *Harris Trust*, 530 U.S. at 246. Count V alleges a limitations provision in the plan is ambiguous and, under one alleged interpretation, might be applied to limit his claims. No matter whether Hudson complains of the provision's interpretation or the disclosure of that interpretation, Plan interpretation and disclosures are solely within the purview and power of the Retirement Board. *See* Dkt. 62 at 18–19 (citing Plan at 30). Thus any "appropriate equitable relief" must be obtained from the Retirement Board, not the Players Association. *Harris Trust*, 530 U.S. at 246.

CONCLUSION

For these reasons, the Court should grant the Players Association's Motion to Dismiss.

New York, New York
Dated: November 30, 2018

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